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IN THE

Supreme Court of the United States

62

No. [redacted] 152

STATE OF MINNESOTA,

Plaintiff,

vs.

ROBERT HUGH ROBINSON,

Defendant.

PETITION AND RECORD FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF MINNESOTA SUPREME COURT

JOSEPH ROBBIE
827 Plymouth Building
Minneapolis 3, Minnesota
Attorney for Petitioner

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SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented for Review	2
Constitutional Issues Involved	3
Statement of the Case:	
I. Procedural History	4
II. Facts Material to the Question Presented	7
III. Federal Questions Raised Below in Trial Court and Before the Minnesota Supreme Court	16
IV. Argument:	
A. General	18
B. Validity of Minnesota Statutes Annotated, §21.12, Under the Federal Constitution if Applied After Acquittal	19
C. Res Judicata and Collateral Estoppel	21
D. The Issue of Double Jeopardy	25
V. Deprival of a Speedy Trial	32
Appendix A—Record	35
Appendix B—Certification	35
Appendix C—Consent	37
Appendix D—Certificate of Judge to the Case	37
Appendix E—The Decision Below by the Minnesota Supreme Court	38
Appendix F—Petition for Reargument	56
Appendix G—Order Denying the Petition for Reargument	65

AUTHORITIES CITED

Cases: Page

Commonwealth v. Roby (1832), 12 Pick. (Mass.) 496, 503 27
Harris v. State, 193 Ga. 109, 17 S.E.2d 573 (1941) 23
People v. Grzeszczak, 137 N.Y.S. 538 (1912) 23
Morey v. Commonwealth (1871), 108 Mass. 433 27
Rex v. Vandercomb (1796), 2 Leach 708, 720, 2 East. P.C. 519 25, 27
State v. Hackett, 47 Minn. 425, 50 N.W. 472 28 Amn. St. Rep. 380 19, 20
United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943) 22
United States v. Johnson, 165 F.2d 42 (3 Cir. 1947) 23
U. S. v. Oppenheimer (1916), 242 U.S. 85, 87, 37 Sup.Ct. 68, 61 L.Ed. 161, 3 A.L.R. 516 21
Yawn v. United States, 244 F.2d 235 (5 Cir. 1957) 22

Statutes:

Minnesota Statutes Annotated:
Section 621.12 19
Section 632.10 2, 7, 16
28 U.S.C.A., Section 1257(3) 1

Constitutional Provisions:

Constitution of the State of Minnesota:
Article VI, Section 2 1
Article I, Section 6 33
Article I, Section 7 20

Constitution of the United States:
Amendment V 2, 3, 16, 17, 18, 20, 21
Amendment VI 2, 3, 16, 17, 18
Amendment XIV (Section 1) 3, 18

Textbooks:

24 Minn. L. Rev. 522 (1939-1940) 21, 26

Miscellaneous:

Freeman, Judgments (5th Ed. 1925), Sec. 626, p. 1319 21
Mayers and Yarborough: "Bix Vexari: New Trials and Successive Prosecutions," 74 Harvard L. Rev. 1, 38, 39 (1960-61) 22
Schmidt, "Res Adjudicata in Criminal Cases," 26 California State Bar Journal 366, 370 (1951) 23

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ROBERT HUGH ROBINSON,

Defendant.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF MINNESOTA SUPREME COURT

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Minnesota entered in the above-entitled case on March 2, 1962.

OPINION BELOW

The opinion of the Minnesota Supreme Court is reported at Minn. , 114 N.W.2d 737.

JURISDICTION

The judgment of the Minnesota Supreme Court was pronounced March 2, 1962. Application for Rehearing by Petitioner was denied April 11, 1962. The jurisdiction of this Court is invoked under 28 *U.S.C.A.*, Section 1257(3).

Article VI, Section 2 of the *Constitution of the State of Minnesota* provides: "The Supreme Court shall consist of one chief judge and not less than six or more than eight associate judges as the legislature may establish. It shall have

original jurisdiction in such remedial cases as may be prescribed by law, and appellate jurisdiction in all cases, but there shall be no trial by jury in said court."

From the final judgment of the Minnesota Supreme Court after taking such appeal from the District Court of Ramsey County, Minnesota, or on questions certified to the Minnesota Supreme Court by the District Court of Ramsey County, Petitioner has no further remedy under the laws of the State of Minnesota.

QUESTIONS PRESENTED FOR REVIEW

The issues involved are the two questions which were certified as "doubtful and important" to the Minnesota Supreme Court by the District Court of Ramsey County pursuant to *Minnesota Statutes Annotated*, Section 632.10:

(1) Under the circumstances disclosed by the record, upon which there is no dispute, does the indictment charging Indecent Assault, the object of the burglary charged in the previous indictment for which the defendant was tried and found not guilty by a jury, and a trial thereupon, constitute double jeopardy within the meaning of Amendment V of the *Constitution of the United States?* (Defendant was acquitted by a jury of the charge of burglary in the first degree with intent to commit a crime, to-wit: Assault. He was later indicted on the charge of Indecent Assault which is conceded by the prosecution to be the same identical assault which was the object of the burglary charged in the first indictment.)

(2) Does the lapse of time between the time of the first arrest, June 5, 1959, and the indictment for the said Indecent Assault on June 28, 1960, deprive the defendant to his right to a speedy trial as provided in Amendment VI of the *Constitution of the United States?*

Implicit in the first certified question are the doctrines res judicata and collateral estoppel.

CONSTITUTIONAL ISSUES INVOLVED

Amendment V to the *Constitution of the United States:*

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI to the *Constitution of the United States:*

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment XIV to the *Constitution of the United States:*

(Section 1)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

4.

PROCEDURAL HISTORY

1. Date of incident from which both indictments arise—May 25, 1959.

2. Date defendant was arrested on suspicion of Burglary—June 5, 1959.

3. Date Information was filed charging defendant with Burglary in the second degree with intent to commit a crime, to-wit: assault—June 9, 1959.

4. Date of arraignment on such Information—June 10, 1959. Bail was set at $5,000.00.

5. Date preliminary hearing was set—June 26, 1959.

6. Date indictment was returned by the Grand Jury of Ramsey County charging the defendant with Burglary in the second degree with the intent to commit assault—June 23, 1959. The preliminary hearing was thereupon cancelled since the indictment charged the same crime as did the Information filed June 9, 1959.

7. Date of arraignment on indictment—June 29, 1959. Bail was set at $10,000.00.

8. Date matter was placed on trial calendar—September 14, 1959.

9. Date first indictment first came on for trial—September 25, 1959.

10. Date defendant was referred to Probate Court of Ramsey County for the purpose of that Court having a hearing to determine whether or not said defendant is mentally ill or whether or not defendant is a psychopathic personality—September 29, 1959.

11. Date Probate Court entered an order that defendant

was not mentally ill and was not a psychopathic personality and returned defendant to the jurisdiction of the District Court—December 2, 1959.

12. Date defendant's trial by jury commenced in District Court of Ramsey County on the first indictment charging defendant with Burglary in the second degree with intent to commit assault—January 11, 1960.

13. Date jury returned verdict that the defendant was not guilty as charged in the first indictment whereupon defendant was discharged—January 22, 1960.

14. Date defendant was rearrested on suspicion of unlawful entry at the home of the Hartwells, 1533 Van Buren, St. Paul, Minnesota—June 14, 1960.

15. Date second indictment was returned by the Grand Jury of Ramsey County charging defendant with the crime of Indecent Assault arising from the same criminal transaction occurring at the Hartwell dwelling house May 25, 1959 (paragraph 1 of this Procedural History, p. 4, supra) —June 28, 1960.

16. Date defendant arraigned on second indictment charging defendant with the crime of Indecent Assault and bail was fixed at $10,000.00—June 30, 1960.

17. Date Ramsey County District Court certified this case to the Minnesota Supreme Court for a determination of two "doubtful and important" issues: (1) the claim of the defendant that prosecution under the second indictment constitutes double jeopardy and the issue is res judicata; and (2) the motion of defendant to dismiss the second indictment because of the unreasonable delay from the time the alleged crime was committed until the second indictment was returned—October 10, 1960.

18. Nature of this action: Defendant was indicted on June 23, 1959, for the crime of Burglary in the second de-

gree with intent to commit a crime, to-wit: assault, arising from a criminal transaction occurring April 25, 1960, described in paragraph 1 of the Stipulation by and between William B. Randall, Ramsey County Attorney, representing the State of Minnesota, and Joseph Robbie, Esquire, representing the defendant (p. 8, infra). The jury returned a verdict of not guilty on January 22, 1960. Defendant was again arrested on June 14, 1960. He was held until June 28, 1960, without charge and without bail, at which time the Grand Jury of Ramsey County returned an indictment charging the defendant with Indecent Assault arising from the same criminal transaction alleged to have occurred at the Hartwell dwelling house on May 25, 1959, described in paragraph 1 of the Stipulation (p. 8, infra). Defendant has never been charged with any crime resulting from the alleged unlawful entry of the Hartwell dwelling house on June 14, 1960, for which he was arrested on suspicion on that date. He was arraigned on June 30, 1960, on the second indictment and pleaded not guilty. His plea was withdrawn on October 10, 1960, and a special plea of former jeopardy was entered by order of the Honorable Robert V. Rensch, one of the Judges of the District Court of Ramsey County. The assault which was alleged in the first indictment to be the object of the burglary charged therein arose from the same physical assault that constitutes the factual basis for the crime of Indecent Assault charged in the second indictment. (See Stipulation, p. 8, infra).

II.

FACTS MATERIAL TO THE QUESTION PRESENTED

The defendant claims double jeopardy and deprival of a speedy trial. The Honorable Robert V. Rensch, Judge of the District Court of Ramsey County, certified these questions to the Minnesota Supreme Court as "doubtful and important" pursuant to *Minnesota Statutes Annotated* 632.10. We refer to the parties as the State and the defendant.

The first indictment charged the defendant with Burglary in the First Degree with the Intent to Commit a Crime, to-wit: Assault. This indictment was returned by the Grand Jury of Ramsey County on June 23, 1959, based upon a criminal incident which occurred on May 25, 1959. We refer to this as the first indictment.

The second indictment charged the defendant with the crime of Indecent Assault based upon the same incident which occurred May 25, 1959. This indictment was returned by the Grand Jury of Ramsey County on June 28, 1960 (one year, one month and three days after the alleged crime, and one year and five days after the first indictment based on the same alleged criminal transaction). We refer to this as the second indictment.

The defendant was tried by jury commencing January 11, 1960. The jury returned a verdict of not guilty as charged in the first indictment and the defendant was thereupon discharged January 22, 1960.

The second indictment furnishes the basis for the two questions certified to the Minnesota Supreme Court in this proceeding. The defendant moved for dismissal of the second indictment in Ramsey County District Court on the following grounds:

(1) Double jeopardy and res judicata;

(2) Deprival of a speedy trial.

The questions were certified to the Minnesota Supreme Court as "doubtful and important."

The following Stipulation was entered into before the Honorable Robert V. Rensch, Judge of the District Court of Ramsey County, representing the State of Minnesota, and Joseph Robbie, Attorney for the defendant, as the undisputed facts upon which the certified questions could be considered and decided:

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between William B. Randall, County Attorney of Ramsey County, representing the State of Minnesota, and Joseph Robbie, Esq., representing the Defendant, that the following events occurred:

1. On May 25, 1959, the private dwelling of Martha Hartwell, at 1533 Van Buren Street, St. Paul, Minnesota, then occupied by Martha Hartwell and her daughter, Lucella Hartwell, was broken into at approximately 12:30 a.m. Martha Hartwell and her daughter, Lucella Hartwell, were sleeping in separate bedrooms on the second floor. They give the following account of what then occurred: The intruder was met at the head of the stairs by Lucella Hartwell, and after some conversation, grasped her by the arm and forced her to accompany him as he went into each room on the second floor. He kissed her. In the bedroom occupied by Martha Hartwell the intruder grasped the telephone out of the hands of Lucella Hartwell and threw it across the room, breaking the wires. He ripped the sheet into strips, with which he tied Martha Hartwell hand and foot and carried Martha Hartwell to the first floor. Lucella Hartwell followed him downstairs. He stepped to the kitchen and turned on the light momentarily, then turned it off. He returned to the dining room with Lucella Hartwell while her mother was on the floor in the living room. Lucella Hartwell asked the intruder if he would care for a cup of coffee or for a cigarette. She offered to play the piano for him. The bindings on Martha Hartwell having come loose, the intruder forced

Lucella Hartwell to remove the tops of her pajamas ostensibly to be used to retie the mother. He touched Lucella Hartwell's breasts and kissed her. The intruder forced Lucella Hartwell to remove the bottoms of her pajamas. While she was nude, she accompanied the intruder across the hall from the living room to another room while he sought other material with which to bind her mother's hands and feet. She ran from the home and was followed and dragged back into the home by the intruder. Lucella Hartwell struck the intruder on the head with a cut glass flower vase. He hit her with his fist. She used the pajamas to wipe the blood from the intruder's head. Later she escaped and ran nude to a neighboring home where the police were called at about 2:30 in the morning.

2. As a result of the inquiry following these events, Robert Hugh Robinson was taken into custody on June 5, 1959, at approximately 6 o'clock a.m. by Detective Marinkov of the St. Paul Police Department and booked, "Suspicion of Burglary and Assault and Suspicion of Robbery." He was held for investigation, without charge and without bail, until June 9, 1959. On June 9, 1959, an Information was filed charging Robert Hugh Robinson with Burglary in the Second Degree with intent to "Assault." On June 10, 1959, he appeared in Municipal Court, represented by Joseph Robbie, Esq., Bail was set for the first time at $5,000.00, and a preliminary hearing was set for June 26, 1959.

3. On June 23, 1959, the Grand Jury of Ramsey County indicted Robert Hugh Robinson of the crime of Burglary in the Second Degree,

> "The said Robert Hugh Robinson on the 25th day of May, A.D. 1959, at the City of St. Paul in said County, then and there being, did wrongfully, unlawfully, feloniously and burglariously break and enter the dwelling house of one Martha Hartwell, said dwelling house being then and there a building situate in said City, County and State, in which said dwelling there were then and there human beings, to wit: Martha Hartwell and Lucella Hartwell, with the intent then and there had and entertained

by him, the said Robert Hugh Robinson, to commit a crime therein, to wit: Assault, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Minnesota."

No preliminary hearing was held. On June 29th Defendant was arraigned in District Court, entered a plea of not guilty, and bail was set at $10,000.00. The matter was placed on the trial calendar for September 14, 1959.

4. On September 25, 1959, the matter came for trial before the Honorable John W. Graff, and prior to the time at which the jury was empaneled, Joseph Robbie, Counsel for Defendant, William B. Randall, Ramsey County Attorney, and John Frank, Assistant Ramsey County Attorney, discussed the events which had led up to the arrest and indictment of the Defendant with the Judge. As a result of this discussion, pursuant to Minnesota Statutes Annotated 525.753, the Judge caused an Order of reference to Probate Court to be entered. The Court states in part:

"Whereas, the Court after some discussion with counsel for both sides, having reason to believe that the Defendant may be mentally ill or psychopathic personality, it is hereby ordered * * * the Defendant be referred to the Probate Court of Ramsey County for the purpose of the Court having a hearing to determine whether or not said Defendant is mentally ill. It is further ordered that the Probate Court of Ramsey County render an opinion as to whether or not said Defendant is a psychopathic personality, * * * if the Probate Court of Ramsey County determines that Defendant is not mentally ill, nor that it has an opinion as to whether or not the Defendant is a psychopathic personality, the Probate Court shall remand forthwith to the custody of the Sheriff of Ramsey County this Defendant, so that he may be returned to the jurisdiction of this Court for further disposition. * * * Where the phrase 'shall be returned to this Court' is used, it means that Defendant will be returned to the

Honorable John W. Graff, Judge of District Court, for further disposition. Dated September 29, 1959."

5. Pursuant to the above Order, the Defendant was transferred to Ancker Hospital, where he remained until the Probate Court hearing. This hearing was conducted on December 2, 1959, the Probate Court having appointed Mr. Zahndahl Miller and Dr. Louis Flynn as medical advisors. The Probate Court entered an Order that Robert Hugh Robinson was

"not mentally ill or a psychopathic personality. The proceedings are dismissed and the patient returned to the jurisdiction of the District Court."

6. Defendant's attorney, Joseph Robbie, requested of Judge Graff that the matter then be placed for immediate trial. The Judge was unable to try the case, being engaged, and indicated that it would be tried following the Christmas recess. Mr. Robbie then asked that the bail be reduced in order that the Defendant could be released from custody, inasmuch as he had been held continuously from and after his arrest. The Judge advised Mr. Robbie by letter that he would sign an Order reducing bail to $5,000 if presented by Defendant's attorney. No Order was presented, presumably because Defendant was unable to raise sufficient funds, and Defendant remained in custody.

7. The matter came on for trial by jury on January 11, 1960, before Judge Graff. The jury returned its verdict that the defendant was not guilty as charged in the Indictment on January 22, 1960, and Defendant was thereupon discharged.

8. On June 14, 1960, at 2:31 a.m., St. Paul Police received a call concerning a break-in at the home of the Hartwells, 1533 Van Buren Avenue in St. Paul. The St. Paul Police Department claims that the following events then occurred (which is included in this Stipulation subject to the objection of defense counsel that it is immaterial to this appeal): Detective Marinkov responded to this call and found the basement window broken, the doorway between the basement and first floor broken, but the intruder was not present. He then traveled one-half mile from the home of the Hartwells to the residence

of Robert Hugh Robinson, at 919 North Snelling Avenue. He was admitted to this residence by Defendant's wife, and found Defendant not present. Leaving the premises, Markinov traveled back towards the Hartwell residence, and found the Defendant walking on Snelling Avenue at about the midpoint between the two residences. Examining the Defendant, Detective Marinkov claims that he found his clothes disheveled and dirty, and with objects adhering in the pockets and cuffs, and examination of the contents of Defendant's pockets disclosed a notation in a book giving the residence address and telephone number of Lucella Hartwell. Defendant was taken to the St. Paul Police Station and booked, 2:53 a.m., "Suspicion of Burglary of a Home." The Defendant's clothing, together with portions of the broken window frame and other objects found at 1533 Van Buren, was sent to the State Bureau of Criminal Apprehension for laboratory examination.

9. The Ramsey County Grand Jury met on June 28, 1960. Witnesses gave testimony concerning the events which took place at the Hartwell residence June 14, 1960, and the circumstances concerning the arrest of Robert Hugh Robinson and his appearance at the time of the arrest. The Grand Jury was advised of a preliminary report from the State Bureau of Criminal Apprehension concerning the articles sent for laboratory tests. Witnesses were also heard concerning the events at the Hartwell home which occurred May 25, 1959. The Grand Jury was advised that Robert Hugh Robinson had been indicted by the previous Grand Jury for "Burglary in the Second Degree," and had been found not guilty. M.S.A. 621.12.

> "612.12—Burglary and other crime punished separately.—Every person who, having entered a building under such circumstances as to constitute burglary in any degree, shall commit any crime therein, shall be punished therefor as well as for the burglary, and may be prosecuted for each crime separately."

was read to the Grand Jury. The Grand Jury returned an indictment against Robert Hugh Robinson on June 28, 1960, as follows:

"The said Robert Hugh Robinson on the 25th day of May, 1959, at the City of St. Paul in said County, then and there being, did willfully, unlawfully and feloniously take indecent liberties without her consent expressly given, with and on the person of one Lucella Hartwell; she, the said Lucella Hartwell, being then and there over the age of 16 years and not a public prostitute, which said acts of him, the said Robert Hugh Robinson, did not in law amount to a rape, an attempt to commit a rape, or an assault with intent to commit a rape."

Defendant was arraigned on June 30, 1960, and by his counsel, Joseph Robbie, entered a plea of not guilty. The matter was set for trial September 12, 1960. He was held under investigation, without charge and without bail, from June 14 to June 28, 1960, and has since remained continuously in custody.

10. The assault alleged as the object of the Burglary in the first Indictment returned June 23, 1959 (described in paragraph 3 of this Stipulation) and the Indecent Assault alleged in the second Indictment returned June 28, 1960 (described in paragraph 9 of this Stipulation) both arose from the incident which occurred May 25, 1959, at the Hartwell home (described in paragraph 1 of this Stipulation) and the physical violence of the intruder on the person of Lucella Hartwell described therein furnishes the factual basis for the assault which was the object of the burglary alleged in the first Indictment and also furnishes the factual basis for the indecent assault alleged in the second Indictment. Defendant was found not guilty of having committed the burglary charged in the first Indictment by the verdict of the jury returned on January 22, 1960.

11. At the jury trial of the first Indictment from January 11 to January 22, 1960, the State of Minnesota introduced evidence from 19 witnesses concerning the entire criminal transaction which occurred at the Hartwell dwelling house commencing about 12:30 a.m. on May 25, 1959. The defendant was found not guilty of being the burglar who so broke and entered the Hartwell dwelling house.

12. On July 12, 1960, a Motion was heard by the Honorable Robert V. Rensch for dismissal of the Indictment on the grounds of double jeopardy. The Court denied the Motion, but allowed defendant's attorney 30 days in which to supply a brief, and granted a stay of his Order. During the 30-day period defendant prepared and filed a brief and served a Motion to dismiss because of unreasonable delay, a Motion to suppress evidence, and Motion for the State to produce transcript of the previous trial. These Motions all came before Judge Rensch for hearing September 12th. The Court indicated the Motions would be denied, and that he would entertain argument concerning certification of the two Motions to dismiss.

13. On September 20, 1960, the defendant was present when his attorney requested the Court to certify the two questions. Defendant was advised by the Court of the length of time such certification would consume, and defendant consented to the certification. Defendant's attorney moved that his plea be withdrawn for the purpose of raising the constitutional questions. The Court then certified the two questions. The Court ordered the plea withdrawn.

WILLIAM B. RANDALL
Ramsey County Attorney
328 Court House
St. Paul 2, Minnesota

JOSEPH ROBBIE
Attorney for Defendant
827 Plymouth Building
Minneapolis 3, Minnesota

It is conceded that both the first and second indictments arise from the same evidence described in Paragraph 1 of the Stipulation. Both parties agree in Paragraph 10 thereof that "the assault alleged as the object of the burglary in the first indictment * * * and the indecent assault alleged in the second indictment * * * both arose from the incident which occurred May 25, 1959, and the physical violence of the

intruder on the person of Lucella Hartwell * * * was the object of the burglary alleged in the first indictment and also furnishes the factual basis for the indecent assault alleged in the second indictment. Defendant was found not guilty of having committed the burglary alleged in the first indictment by the verdict of the jury returned on January 22, 1960."

Paragraph 11 of the above Stipulation contains the agreement of both parties, "that, at the jury trial of the first indictment from January 11 to January 22, 1960, the State of Minnesota introduced evidence from 19 witnesses concerning the entire criminal transaction which occurred at the Hartwell dwelling house commencing at about 12:30 a.m. on May 25, 1959. The Defendant was found not guilty of being the burglar who so broke and entered the Hartwell dwelling house."

The defendant's claim that the issues in the second indictment charging indecent assault are res judicata is based upon the State's admission in Paragraphs 10 and 11 of the Stipulation that defendant was found not guilty upon trial of the first indictment of being the burglar who broke and entered the Hartwell dwelling house and the State's further admission that the burglar in the first indictment is the same intruder who committed the indecent assault charged in the second indictment.

The opinion of the Minnesota Supreme Court answering these certified questions is included with this Petition as Appendix E. The majority opinion is concurred in by three justices. There is a separate concurring opinion in order to provide a majority of the Court. Two justices vigorously dissent.

The Ramsey County Public Defender, John S. Connolly, Esquire, appeared Amicus Curiae and requested the Minnesota Supreme Court to find that the issues in the second in-

dictment are res judicata and that collateral estoppel precludes trial of the defendant on the second indictment. Andrew B. Kjos, Esquire, appeared of counsel with the public defender.

III.

FEDERAL QUESTIONS RAISED BELOW IN TRIAL COURT AND BEFORE THE MINNESOTA SUPREME COURT

The Honorable Robert V. Rensch, Judge of the District Court of Ramsey County, certified two Federal questions raised here to the Minnesota Supreme Court as being "doubtful and important" pursuant to *Minn. Stat.*, §632.10, specifically including in the certified questions his request for a determination as to whether or not, under the undisputed facts, the present indictment constitutes double jeopardy within the meaning of Amendment V of the *Constitution of the United States*, and whether or not the defendant is deprived of his right to a speedy trial, as provided in Amendment VI of the *Constitution of the United States*, where he was arrested in June, 1959, and charged only with burglary in the first degree with intent to commit a crime, to-wit: assault, of which he was found not guilty by a jury on January, 1960, and was not indicted for indecent assault arising from the same identical criminal transaction until June, 1960, one year after his first arrest.

The defendant invoked his guaranteed protections under Articles V and VI and under the Fourteenth Amendment of the *United States Constitution* in moving for dismissal of the present indictment in the trial court. These protections were directly raised before the Minnesota Supreme Court by the questions certified by the trial judge (The Honorable Robert V. Rensch) and in defendant's brief and oral argument.

The trial court certified the questions to the Minnesota Supreme Court as "doubtful and important." The Minne-

sota Supreme Court answered in its opinion that these undisputed facts do not enable it to determine whether trial of the present indictment would constitute double jeopardy under Article V of the *United States Constitution* but answered that the defendant was not deprived of a speedy trial under Article VI of the *United States Constitution*. The Supreme Court remanded the case to the District Court because it held that the doctrines of collateral estoppel and res judicata prevent the trial of the defendant upon the second indictment for indecent assault if the trial court finds that the sole issue litigated was the identity of the intruder when the defendant was found not guilty of the charge of burglary in the first degree with intent to commit a crime, to-wit: assault.

Only three of six participating Justices adopted this view. The Chief Justice concurred specially "in order that there may be a majority of the Court to answer the questions submitted to us by the trial court." He was the only member of the Court who held that the defendant should be ordered to trial immediately. He said: "What we are now doing is to remand the case with leave to the defendant to do something that is in my opinion impossible." (p. 48, infra.) The two other Justices vigorously dissented and held that on the undisputed facts the trial of the second indictment would constitute double jeopardy.

IV.

ARGUMENT

A. General

Certiorari should be granted because the questions of double jeopardy, res judicata, collateral estoppel, and the defendant's right to a speedy trial, which involve Articles V and VI and the Fourteenth Amendment of the *United States Constitution*, were submitted to the Minnesota Supreme Court for answers because the trial judge considered them "doubtful and important." These questions are unique because they involve an attempt to retry an accused who has been found not guilty of burglary for a second offense that the prosecution admits was committed by the same burglar in the same criminal transaction.

This Petition involves basic rights of the accused and fundamental protections in the administration of criminal justice.

The United States Supreme Court has clarified the law as to the use of evidence in state courts obtained by confessions extracted from the accused after prolonged detention or by alleged illegal search and seizure.

There is no similar pronouncement upon the Federal constitutional protections to which the accused is entitled in state court where he is being subjected to trial on a subsequent indictment arising out of the same criminal transaction as a charge of which he has already been found not guilty, or where the identity of the accused has been adjudicated by a jury verdict finding him not guilty of burglary and the prosecution subsequently attempts to retry the issue of identity by a second indictment charging him with another crime which it admits was committed by the same burglar while on the invaded premises.

The law as to what constitutes double jeopardy, or as to where the doctrines of res judicata or collateral estoppel should apply under the Federal Constitution, is in a confused and chaotic condition in the state courts.

B. Validity of Minnesota Statutes Annotated, 621.12, Under the Federal Constitution if Applied After Acquittal

Minnesota has a statute which provides:

> "A person who, having entered a building under such circumstances as to constitute burglary in any degree, shall commit any crime therein, shall be punished therefor, as well as for the burglary, and may be prosecuted for each crime separately." (*Minnesota Statutes Annotated* 621.12.)

The Minnesota Supreme Court decided in 1891 in *State v. Hackett*, 47 Minn. 425, 50 N.W. 472, 28 Amn. St. Rep. 380, that a person who, having entered a building under such circumstances as to constitute burglary, could also be prosecuted for larceny committed in the course of the burglary, although he is acquitted of the burglary.

It does not appear that when that case was appealed the issues of res judicata or constitutionality were presented, briefed, argued or decided.

If *Minnesota Statutes Annotated*, 621.12, is constitutional, it is valid only as it applies to the situation where the defendant is first *convicted* (or has not been first acquitted) of the burglary. It may be that he then can be constitutionally punished for any crime while in the building he broke and entered under such circumstances as to constitute burglary. At least in that situation the principle of res judicata does not interfere. It is unnecessary to decide whether the statute is constitutional under those circumstances. Such a case is clearly distinguished from one where the defendant is first *acquitted* of being the burglar.

This brings us to the most important point which was not discussed or decided in *State v. Hackett*. The statute provides that a "*person who, having entered a building* under such circumstances as to constitute burglary in any degree" may be separately prosecuted for any crime committed therein. Read strictly, as any criminal statute must be read, a finding that the defendant is the burglar is a prerequisite to any subsequent prosecution for any crime committed in the course of the burglary. The defendant Robinson is not "a person who *entered a building* under such circumstances as to constitute burglary in any degree" because he has been acquitted of entering the building and being the burglar. The statute obviously does not apply to him. To any extent that the statute can be applied to Robinson, it is clearly unconstitutional as being a violation of the Fifth Amendment to the *United States Constitution* and Article I, Section 7, of the *Minnesota Constitution*.

We emphasize that the statute can only apply, if at all, to a convicted burglar, not one acquitted of burglary. If it is intended to apply after acquittal, it is unconstitutional.

It is imperative that the United States Supreme Court declare that an accused cannot be separately tried for other offenses committed by a burglar when he has already been found not guilty of being that burglar.

It is essential in the administration of criminal justice that the United States Supreme Court declare public policy on what constitutes double jeopardy.

It is equally vital that the correct application of the doctrines of res judicata and collateral estoppel to criminal trials be determined.

These questions represent an area of uneven administration of criminal justice in Minnesota and other jurisdictions. They deserve the same close and careful scrutiny that has been given to the reception of evidence resulting from con-

fessions obtained after prolonged detention or evidence which results from unlawful search and seizure.

One of the most sacred safeguards of our liberty is the admonition of Amendment V of the *Constitution of the United States:*

"Nor shall any person be subject for any offense to be twice put in jeopardy of life or limb."

This protection is but a tinkling cymbal if the accused can be found not guilty of burglary and then retried for other crimes committed by the same burglar. Amendment V then becomes to the accused but an elevated statement of the conscience of America without force to apply it to his liberty.

We earnestly petition the United States Supreme Court to sweep away the cobwebs from the decisions which by various tests set out in this Petition arrive at a tortured application of the historical protection against double jeopardy.

The accused in the present case has served more than one year in jail without being convicted of any crime and after his innocence of burglary has been established. Nevertheless, he remains accused, and still would be in jail except for bail, on a charge which the prosecution admits was committed by the same burglar a jury said he was not.

C. Res Judicata and Collateral Estoppel

No discussion is required here of the doctrine of res judicata in criminal prosecutions. The Minnesota Supreme Court, in the opinion here for review, held that the doctrine of res judicata applies in criminal cases which removes the necessity of proving its relevance. (See also 24 *Minn. L. Rev.* 522 (1939-1940); *U. S. v. Oppenheimer* (1916), 242 U.S. 85, 87, 37 Sup.Ct. 68, 61 L.Ed. 161, 3 A.L.R. 516; and Freeman, *Judgments* (5th Ed. 1925), at Sec. 626, p. 1319.)

After determining that res judicata is available in a criminal prosecution, the Minnesota Supreme Court erred in not finding from the face of the record that the issue of the identity of the burglar was by admission of the prosecutor the sole issue litigated in the trial of the first indictment, thus preventing the trial of the accused upon the second indictment by the rule enunciated in the majority opinion.

The Minnesota Supreme Court has also determined that collateral estoppel applies in the present case. Having found that collateral estoppel exists in criminal prosecutions, the Minnesota Supreme Court erred in not properly applying the doctrine of collateral estoppel to the present case.

Collateral estoppel is controlling because the only rational conclusion of the prior adjudication is that the defendant could not have been present at the scene of the crime. The jury found defendant Robinson not guilty of burglary. His affirmative defense was that of an alibi. The stipulated facts declare that the burglar and the assailant are identical. Thus, the necessary implication is that Robinson could not have been guilty of indecent assault in the eyes of the jury.

Furthermore, the principles of res judicata and collateral estoppel are well recognized throughout the United States. The Federal rule has been expounded as being that the court must examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration: Mayers and Yarborough: "*Bis Vexari: New Trials and Successive Prosecutions*," 74 Harvard L. Rev. 1, 38, 39 (1960-61); *Yaun v. United States*, 244 F.2d 235 (5 Cir. 1957); *United States v. De Angelo*, 138 F.2d 466 (3d Cir. 1943).

Other authorities also indicate that matters once finally determined cannot be relitigated in a subsequent proceeding

involving the same parties where a general verdict such as not guilty is brought in by a jury. Schmidt, "*Res Adjudicata in Criminal Cases*," 26 California State Bar Journal 366, 370 (1951); *People v. Grzesczak*, 137 N.Y.S. 538 (1912); *Harris v. State*, 193 Ga. 109, 17 S.E.2d 573 (1941).

It is therefore evident that collateral estoppel will not work in favor of a defendant in every case. It is a "two-way street." Thus, if Robinson had been found guilty of burglary he would have been estopped on the facts decided therein. Among these facts would have been the determination that he had intended to indecently assault Lucella Hartwell. It is clear that by looking beyond the prior judgment to determine what facts were actually, or by necessary implication, adjudicated by the former judgment, the only conclusion one can draw is that Robinson can not be tried for indecent assault since the necessary implication from the acquittal is that Robinson was not present at the time the assault took place because he was not the intruder who was stipulated to be both the burglar and the assailant.

The principle of collateral estoppel has been hailed as being within the safeguards provided by the Constitution of the United States. *United States v. Johnson*, 165 F.2d 42 (3 Cir. 1947).

The constitutional ramifications of the doctrine of collateral estoppel are reasonable and proper when the result of disregarding the principle is viewed. Defendant Robinson by being tried again on a charge which includes facts and issues which are actually litigated in the first trial is being deprived of his right to be tried only once on each fact issue.

Robinson was acquitted on January 22, 1960, on the burglary charge. Then on June 28, 1960, over five months later, he was indicted on an assault charge which necessarily was decided by the jury in the first trial. To avoid the harassment

of another trial, further economic loss, the stigma attached to himself and his wife and family, the limitation on freedom of movement due to imprisonment or bail and the psychological strain of an uncertain future, justice demands that he should be finally freed of any charges arising out of the facts litigated in the first trial. The principle of collateral estoppel is the judicial tool that should be utilized to avoid further uncertainty and anguish to a man who is being vexed by our judicial process.

This defendant withstood a jury trial lasting two weeks, and the testimony of 19 prosecution witnesses, and has obtained a verdict that he is not guilty of being the burglar who broke and entered the Hartwell dwelling house on May 25, 1959. He is now a second time in jeopardy of punishment for the Indecent Assault committed by the burglar. Having been found not guilty of being the burglar, the issue is settled, and the State cannot be heard to again assert that he is the burglar.

By their own testimony and their own view of the facts, the State charges that the defendant is the burglar when they indict him with being the assailant. They cannot prove he is the assailant without also proving that he is the burglar. If he is one, he is the other.

Conversely, the defendant could not be acquitted of being the burglar upon trial by jury of the first indictment without a finding by the jury that he was not the assailant. Since the same man is both the burglar and the assailant, a finding as to either is conclusive of the other.

Thus, the finding of the first jury upon the first indictment that this defendant is not the burglar is a conclusive finding that he is not the assailant named in the second indictment. This issue being res judicata, the second indictment must be dismissed.

D. The Issue of Double Jeopardy

The undisputed facts are that the separate *first indictment of burglary in the second degree with intent to commit a crime, to-wit; Assault* and the *second indictment of Indecent Assault* are (1) based upon the same criminal transaction, (2) dependent upon identical evidence, and (3) had the first jury found that defendant was the one who committed the indecent assault described by the complaining witness, it must necessarily have found him guilty of the charge of burglary in the second degree with intent to commit a crime, to-wit, Assault, as charged, because if he was the assailant he was also the burglar.

In his opening statement to the jury when defendant was tried on the first indictment for burglary on January 11, 1960, the Ramsey County Attorney related the criminal transaction upon which that indictment was based. His statement was in substantial accord with paragraph 1 of the Stipulation (p. 8, infra). He asserted, as he now stipulates, that the burglar and the assailant were the same person. Lucella Hartwell's testimony on the trial of the first indictment was to the same effect. She described the entire incident including the alleged indecent assault.

The rule which has found the most favor for determining whether or not two offenses are so identical that prosecution for one would constitute a bar to the prosecution for the other under double jeopardy principles is the so-called "same evidence" test which was enunciated in the English case of *Rex v. Vandercomb* (1796), 2 Leach 708, 720, 2 East. P.C. 519.

The rule of *Rex v. Vandercomb* is "that unless the first indictment was such as the person might have been convicted upon by proof of the facts contained in the second indictment, an acquittal of the first indictment can be no bar to

the second." Perhaps a more satisfactory statement of the test would be that "a conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other." 24 *Minn. L. Rev.* 522.

Here, the defendant must necessarily have been convicted of burglary upon trial of the first indictment had the jury believed that he was the assailant.

The note in 24 *Minn. L. Rev.* 522 contains an excellent review of the entire problems of Federal and state protection against double jeopardy:

> "No phase of the double jeopardy field has proved to be no more troublesome than the question whether in a given case the offenses charged are sufficiently similar to be within the prohibition or sufficiently distinct to be prosecuted separately." (p. 546.)

This is the problem in the present case.

The article states as the rationale of the double jeopardy protection:

> "Admittedly it is undesirable to allow the state repeatedly to harass a defendant for different degrees or elements of a crime when the entire matter could be settled at one trial; and double jeopardy principles preclude such multiple prosecution. If the state fails to avail itself of all of the facts at hand and prosecutes the defendant for a lesser crime than that of which he is guilty the defendant should not be made to bear the risk." (p. 545.).

The author then discusses the situation in which Robinson finds himself:

> "Various tests have been applied by the courts in determining whether or not two offenses are so identical that a prosecution for one will constitute a bar to prosecution for the other under double jeopardy principles, the one apparently finding the most favor being the so-

called 'same evidence' test which was laid down in the English case of Rex v. Vandercomb: 'that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second.'" (Citation for *Rex v. Vandercomb*, supra.)

The same or a similar test has been approved in a number of American decisions listed on p. 547, footnote 151. In *Commonwealth v. Roby* (1832), 12 Pick (Mass.) 496, 503, the Court said, "it must appear by the plea that the offense charged in both cases was the same in law and in fact." The Massachusetts Court said in *Morey v. Commonwealth* (1871), 108 Mass. 433, that "a single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the others."

The author concludes:

> "However, it is least settled that the plea of double jeopardy does rest upon the facts alleged in the second indictment rather than upon those proved in evidence at the second trial; thus the test is generally stated in terms of whether or not *the evidence necessary to sustain a conviction under the second indictment would have convicted the defendant under the first.* Occasionally the test has been reversed, however, and a second prosecution allowed *if* the defendant could not have been convicted of the evidence charged in the second. Perhaps a more satisfactory statement of the test would be that 'a conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other.'" (pp. 548-549.) (Emphasis supplied.)

The second test listed by the Minnesota Law Review note editor is the "same transaction" test which "has been squarely adopted, many courts holding that there can be only one prosecution for the consequences of a single criminal transaction." A third is the "gravamen of the offense" test whereby a second prosecution is barred if the principal unlawful act involved in each prosecution is the same (p. 552).

Focusing his attention on Minnesota, the note editor says:

> "The Court early adopted a rather liberal position with respect to the problem of what constitutes a single offense for purposes of the doctrine of double jeopardy. In *State v. Moore* (1902), 86 Minn. 422, 90 N.W. 787, 61 L.R.A. 819 and note, it was held that a defendant who had been convicted of uttering a forged mortgage could not be convicted of uttering the forged note which the mortgage purported to secure where both note and mortgage were uttered at the same time, and in *State v. Klugherz* (1904), 91 Minn. 406, 98 N.W. 99, 1 Ann. Cas. 307 and note, the Court held that the making of a forged mortgage and the uttering of it, by the same person in one transaction, could not be separately prosecuted. In those cases the Court pointed out that the separate uttering of the same forged instrument, might under certain circumstances, constitute separate offenses, but that when both were part of a single transaction they constituted but one offense for which there could be but one prosecution.
>
> "* * * and in *State v. Fredlund* (1937), 200 Minn. 44, 50, 273 N.W. 353, 113 A.L.R. 215, and note, where as a result of one automobile collision two persons were killed, the position which had been taken earlier seems to have been reversed completely, the Court saying, 'Obviously the proof of the death of Mrs. Busch cannot possibly acquit or convict the defendant of the killing of the child.' In the recent case of *State v. Winger* (1938), 204 Minn. 164, 282 N.W. 819, 119 A.L.R. 1202, the Court seemed to give no indication of reverting to its former position; for in holding that an acquittal of rape was no bar to a prosecution for carnal knowledge of a female

child under the age of 18 years the Court approved, as the test of whether the defendant had been in jeopardy, the test of whether under the first indictment the defendant could have been convicted of the offense charged in the second."

"Circumstances surrounding several of those Minnesota cases reveal that it is probably an influential factor in many double jeopardy decisions, viz., the fact that unless a second trial is permitted, a particular defendant who is generally believed to be guilty will be permitted to go free because he has been once in jeopardy and has succeeded in escaping the punishment he deserves. In the *Klugherz* case, for example, after the jury had retired for deliberation in the first prosecution for the uttering of the forged mortgage, certain eye witnesses to the execution of the mortgage, who had testified that the defendant was not the man who had executed it, concluded that they had been mistaken and said they would testify that he was the man. Consequently he was prosecuted again for forgery, but the Supreme Court properly held that double jeopardy principles precluded such a prosecution. In the *Fredlund* case similar considerations may have influenced the opinion of the Supreme Court itself. In that case the Court, strictly applying the 'same evidence' test, held that prosecution for each of the two deaths which resulted from a single collision would not place the defendant twice in jeopardy for the same offense; however, the whole tenor of the opinion might seem to indicate that in the mind of the Court the defendant was guilty and that to set him free would be to permit a traversity on justice. In such cases the motives of both the prosecuting officials and the courts are of the highest; however, the difficulty is that the extrinsic facts do not generally appear when the decisions are referred to as precedents, and the doctrine which has developed for the protection of hapless victims of multiple prosecution becomes warped by attempts to compensate for other mistakes in law enforcement and procedure."

There is no justification permitting Robinson to be placed in jeopardy a second time based on any greater likelihood that he will be convicted the second time than the first. There

is no new evidence which was not presented at the first trial and there is no claim that the first trial resulted in a miscarriage of justice because of inability to present all of the evidence against the defendant at that time. There is no consideration of public policy calling for a relaxation of double jeopardy principles in line with these Minnesota cases such as *Klugherz* where there was just concern that a guilty man was obtaining freedom because of something occurring at the first trial or in the intervening period. Here nothing has happened with respect to the Hartwell incident since Robinson was acquitted.

In summary as to double jeopardy, four tests are defined:

(1) The "*Same Evidence*" test whereby there can be no second prosecution if the evidence necessary to substantiate the prosecution under the second indictment would have convicted the defendant under the first.

(2) The "*Same Transaction*" test whereby there can be only one prosecution for the consequences of a single criminal transaction.

(3) The "*Gravamen of the Offense*" test whereby a second prosecution is barred if the principal unlawful act involved in each prosecution is the same.

(4) "*Public Policy*" that even where there are distinct offenses there may not be separate prosecutions without a violation of the principles of double jeopardy if harassment or injustice to the defendant would result or a ridiculous result would be reached (as in the playing of more than one hand of poker or cutting more than one mail bag).

The fourth is actually a relaxation of the first three tests to prevent a second prosecution even in cases where otherwise the accused might be prosecuted if any of the first three tests were applied.

If Robinson can now be tried for indecent assault, having been acquitted of being the one who committed the *burglary with intent to commit that assault*, what is to prevent his later trial for larceny arising from the same transaction since Lucella Hartwell testified at the first trial that her real burglar-assailant made off with some $8.00 of her money during the course of the incident she described? The real evil of double jeopardy is never better depicted than in this Robinson case. Since the prosecution cannot pin a new crime upon him, they seek to retry him for one of which he has already been acquitted. If the Constitution of the United States and the State of Minnesota are not sufficient to protect him, nothing can stop the police from continuing to pick him up whenever a crime is committed which they cannot otherwise solve or to retry him on another aspect of the original Hartwell incident. By holding him 7½ months first without bail, then under heavy bail, the police and prosecution have done much to ruin the defendant's chance to support himself and his family. This continued harassment can destroy his life.

This is not a case where the State seeks to lengthen the prison term of a convicted burglar by prosecuting him for other crimes committed during the same burglary, where separate and distinct evidence is involved, as in the cited cases where the defendant played more than one hand of poker or cut more than one mail bag.

Instead, this is the case of one already acquitted upon identical evidence arising from the same transaction where the jury has already found that he is not the criminal.

Magna Carta, the American Bill of Rights, the Common Law of England, the Minnesota Constitution, all of Anglo-Saxon jurisprudence, and basic tenents of fair play are erected to prevent this kind of persecution. When a man is once acquitted upon a full, fair and able presentation of all of the

evidence against him, as was done here, to try him again is contrary to American principles of justice.

V.

DEPRIVAL OF A SPEEDY TRIAL

The incident which is the subject of both the first and second indictment occurred May 25, 1959. The defendant was first arrested on June 5, 1959. Thereafter he was held for five days without bail and without charge whereupon an Information was filed charging him with Burglary in the Second Degree with Intent to Commit a Crime, to wit: Assault. When he demanded a preliminary hearing, an indictment was returned by the Grand Jury of Ramsey County. He was held in jail for seven and one-half months before being acquitted by a jury. He was then free until June 14, 1960, more than a year from the commission of the crime which is at issue. He was then arrested and held for fourteen days without charge and without bail. On June 28, 1960, he was indicted by the Grand Jury of Ramsey County for Indecent Assault. This Second Indictment occurred one year, one month and three days after the incident leading up to the indictment and one year and twenty-three days after his first arrest.

During this entire period, Robinson had been under the constant surveillance of the police. He was in their custody for more than eight months of that year. Yet there is no new information alleged which the police or prosecutor did not have in their possession when the defendant was first indicted June 23, 1959, based upon the same criminal transaction. Nor is there any new evidence of any kind relating to the incident at the Hartwell home May 25, 1959, which was not disclosed from the witness stand in the exhaustive trial occurring January 11-12, 1960.

There can be no clearer test of the principles of Magna Carta (40), the Sixth Amendment to the United States Constitution or Article 1, Section 6, of the Minnesota Constitution which provide that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.

Here the prosecution had an opportunity any time from June 5, 1959, to prosecute the defendant Robinson for indecent assault if they had evidence to support such a charge. Instead, they placed a different charge, upon which they were unsuccessful. They then waited another four and one-half months, during which time they found no new or additional evidence, before rearresting Robinson on suspicion of a different unlawful entry, and they then waited fourteen days while holding him in jail without charge and without bail before charging him again in an indictment arising from the same transaction as the crime for which he had earlier been acquitted.

It is true that the police arrested Robinson on the suspicion that he unlawfully entered the Hartwell home on June 9, 1959. Yet after holding him for fourteen days without charge and without bail, they placed no such charge against him, and they have placed none to this date. It is obvious that they do not have the evidence that Robinson committed this alleged crime or they would have charged him with it. When the prosecution holds a man for fourteen days, in serious violation of his personal rights, on suspicion of committing a particular crime, and then does not charge him with it, it is not strange that they should go thirteen months into the past to try and resurrect a reason for having held the defendant without charge and without bail for fourteen days in jail, even though the charge they dredge up is one of which he was by necessary inference acquitted several months earlier. The right to a speedy trial is not to be lightly regarded. Its roots

in history go back to the period when defendants were incarcerated for long periods without being brought to trial. The current proceeding is a relic of these by-gone days because the defendant Robinson was held in jail for eight months before the present charge was placed and served approximately another five months after the second indictment was returned and before he could post bail.

Respectfully submitted,

JOSEPH ROBBIE
827 Plymouth Building
Minneapolis 3, Minnesota
Attorney for Petitioner

APPENDIX A

Record

The transcript of the record in this case as required by Rule 21, certified by the Clerk of the Minnesota Supreme Court, accompanies this Petition.

The Stipulation of Facts upon which the questions were submitted to the Minnesota Supreme Court by the Trial Court is included in the Statement of the Case, II, Facts Material to the Question Presented, with this Petition (p. 7, supra). The only remaining portions of the printed record before the Minnesota Supreme Court are the Certification, Consent and Certificate of Judge to the Case, which are printed herein as Appendices B, C and D, respectively. We also append the Petition for Reargument as Appendix F and the Order Denying the Petition for Reargument as Appendix G.

The Opinion of the Minnesota Supreme Court in this case is printed in this Petition as Appendix E.

We, therefore, include with this Petition the complete printed record before the Minnesota Supreme Court.

APPENDIX B

Certification

Let the record show that this matter came before this Court on September 20, 1960, on various motions made by the defendant among others,

1. A plea of former jeopardy, and,
2. A motion to dismiss on the ground that the defendant had been deprived of his Constitution right to a speedy trial.

The defendant was present personally and represented by his Counsel, Joseph Robbie, Esq. The State was represented by William R dall, Esq., the County Attorney, and Albert E. Ranum, Esq., Assistant County Attorney, and the Court, having heard the arguments of Counsel and having consi-

dered briefs filed in behalf of the defendant and authorities presented in behalf of the State by the County Attorney, and upon all the files and records in this matter,

IT IS ORDERED that the plea of former jeopardy be and the same hereby is denied.

IT IS FURTHER ORDERED that the motion to dismiss on the ground of the defendant being denied his Constitutional right to a speedy trial be and the same hereby is denied.

HOWEVER, the issue raised by said plea of former jeopardy and by said motion to dismiss are regarded by this Court as being "doubtful and important."

NOW, THEREFORE, according to the provisions of Section 632.10 Minnesota Statutes Annotated, the following questions are hereby certified to the Supreme Court of Minnesota as "doubtful and important."

1. Under the circumstances disclosed by the record, upon which there is no dispute, does the indictment charging Indecent Assault, the object of the burglary charged in the previous indictment for which the defendant was tried and found not guilty by a jury, and a trial thereupon, constitute double jeopardy within the meaning of Article 5 of the Constitution of the State of Minnesota?

2. Does the lapse of time between the arrest in June, 1959, and the indictment for said Indecent Assault in 1960 deprive the defendant of his right to a speedy trial, as provided in Article 6 of the Constitution of Minnesota? (R. Minnesota Supreme Court, p. 12.)

APPENDIX C

Consent

This matter having come on for hearing before the District Court of Ramsey County before the Honorable Robert V. Rensch, one of the judges thereof, at 9:30 A.M. on September 20, 1960, to hear and dispose of certain motions by the defendant to dismiss his indictment, and the Court having denied said motions but having found that the issues raised by the motions to dismiss on the grounds of former jeopardy and unreasonable delay in filing the present indictment against the defendant charging him with Indecent Assault, are important and doubtful, and the Court having fully advised the defendant, the defendant hereby consents in writing, having already consented in Chambers in the presence of the Ramsey County Attorney and defendant's Counsel, and in the presence of the Court, to the certification of such issues to the Minnesota Supreme Court for determination. (R. Minnesota Supreme Court, p. 14.)

APPENDIX D

Certificate of Judge to the Case

I hereby certify that the foregoing case consisting of the documents filed with the Clerk of the District Court, and named as follows:

1. Stipulation
2. Certification
3. Consent

have been examined by me and found conformable to the truth and to contain all the evidence and documents necessary to present the question of law arising herein, and I do report and certify the same as the case herein and the question of law involved. (R. Minnesota Supreme Court, p. 15.)

APPENDIX E

The Decision Below by the Minnesota Supreme Court

No. 75 Ramsey County

Otis, J.
Concurring, Knutson, C. J.
Dissenting, Thomas
Gallagher, J., Nelson, J.
Took no part, Rogosheske, J.

State of Minnesota,

Plaintiff,

38265 vs.

Robert Hugh Robinson,

Defendant.

Endorsed Filed March 2, 1962 Mae Sherman, Clerk
Minnesota Supreme Court

SYLLABUS

1. A defendant acquitted of a burglary charge involving an indecent assault is not twice put in jeopardy contrary to U. S. Const. Amend. V and Minn. Const. art. 1, §7, if thereafter he is tried again for the same assault.

2. The record submitted on appeal held inadequate to determine whether the doctrine of res judicata or collateral estoppel bars defendant's prosecution for indecent assault after his acquittal of a burglary charge involving the same assault.

3. Attempts to show by affidavit the facts found in arriving at a verdict held an invasion of the jury's deliberations and entitled to no weight.

4. Unless defendant, previously acquitted of burglary, furnishes a sufficient record of the prior prosecution to support a finding that defendant's alibi was the only issue there

litigated, a subsequent charge of indecent assault arising out of the same burglary is not barred by the doctrine of res judicata or collateral estoppel.

5. The time after which a defendant is entitled to a speedy trial under U. S. Const. Amend. VI and Minn. Const. art. 1, §6, commences when he has been charged with an offense and has demanded an immediate hearing.

6. Extraneous and irrelevant matter in the briefs, not a part of the record, held improper and ordered stricken.

Remanded with directions.

OPINION

OTIS, Justice.

This opinion is written pursuant to a reassignment made effective January 10, 1962. The issues here for decision arise out of an order of the district court denying motions to dismiss an indictment charging appellant with the crime of indecent assault. In tendering its order the trial court, pursuant to Minn. St. 632.10, certified the following questions as doubtful and important:

> "1. Under the circumstances disclosed by the record, upon which there is no dispute, does the indictment charging Indecent Assault, the object of the burglary charged in the previous indictment for which the defendant was tried and found not guilty by a jury, and a trial thereupon, constitute double jeopardy within the meaning of Article 5 of the Constitution of the State of Minnesota?
>
> "2. Does the lapse of time between the arrest in June, 1959 and the indictment for said Indecent Assault in 1960 deprive the defendant of his right to a speedy trial, as provided in Article 6 of the Constitution of Minnesota?"

In answer to the first question, the matter is remanded for further proceedings pursuant to the decision we here reach. With respect to the second question, our answer is in the negative.

The pertinent facts governing a disposition of this matter are set forth in a stipulation entered by the county attorney

and defendant's counsel. It appears that on May 25, 1959, an intruder entered the home of one Martha Hartwell at 1533 Van Buren Street in the city of St. Paul and took indecent liberties with her daughter, Lucella Hartwell. On June 23, 1959, defendant was charged with burglary in the second degree pursuant to the following indictment:

> "The said Robert Hugh Robinson on the 25th day of May, A.D. 1959, at the City of St. Paul in said County, then and there being, did wrongfully, unlawfully, feloniously and burglariously break and enter the dwelling house of one Martha Hartwell, said dwelling house being then and there a building situate in said City, County and State, in which said dwelling there were then and there human beings, to wit: Martha Hartwell and Lucella Hartwell, with the intent then and there had and entertained by him, the said Robert Hugh Robinson, to commit a crime therein, to wit: Assault, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Minnesota."

After a trial for this offense the defendant was acquitted by a jury in the District Court of Ramsey County. In June of 1960 the Hartwell home was again invaded and defendant was again apprehended, but instead of being prosecuted for this offense defendant was charged with indecent assault pursuant to the following indictment:

> "The said Robert Hugh Robinson on the 25th day of May A.D. 1959, at the City of St. Paul in said County then and there being, did wilfully, unlawfully and feloniously take indecent liberties without her consent expressly given with and on the person of one Lucella Hartwell; she, the said Lucella Hartwell, being then and there over the age of sixteen years and not a public prostitute, which said acts of him, the said Robert Hugh Robinson, did not in law amount to a rape, an attempt to commit a rape, or an assault with intent to commit rape."

As a part of their stipulation the state and the defendant agree that the assault referred to in the burglary indictment and the indecent assault alleged in the second indictment arose out of the same incident at 1533 Van Buren Street on May 25, 1959. The stipulation provides that the physical

violence inflicted upon Lucella Hartwell on May 25, 1959, at 1533 Van Buren Street, St. Paul, furnished the factual basis for both the assault which was the object of the burglary and the indecent assault for which defendant is here indicted. In July 1960 the defendant moved to dismiss the indictment for indecent assault on the ground that it is inviolation of his constitutional right against double jeopardy and for the further reason that it is barred under the doctrine of res judicata; subsequently he moved to dismiss the indictment because it denies defendant a speedy trial. The trial court, having denied defendant's motions, certified the questions here for review as doubtful and important.

The two questions certified by the trial court inadvertently allude to Minn. Const. art. 5 and 6, whereas the correct reference is to U. S. Const. Amend. V and VI. Comparable provisions of the Minnesota Constitution are found in art. 1, §7, dealing with double jeopardy, and art. 1, §6, dealing with speedy trials.

1. No attempt is made by the defendant to distinguish State v. Hackett, 47 Minn. 425, 50 N.W. 472, but he characterizes its holding as "archaic." In that case the defendant was convicted of grand larceny after a prior acquittal for burglary, the object of which was the same larceny for which he was subsequently prosecuted. We held that Minn. St. 621.12 authorized the second prosecution and that it did not constitute a violation of defendant's right not to be twice put in jeopardy. We here decline to overrule the Hackett decision. The authorities cited by defendant do not require a different conclusion.[1] Minn. St. 621.12 reads thus:

> "Every person who, having entered a building under such circumstances as to constitute burglary in any degree, shall commit any crime therein, shall be punished therefor as well as for the burglary, and may be prosecuted for each crime separately."

2. The problems we here face do not involve the principles of double jeopardy as much as the doctrine of res judicata or collateral estoppel. The question is whether the record requires us to hold that there was implicit in the verdict of

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[1] State v. Fredlund, 200 Minn. 44, 47, 273 N.W. 353, 355; State v. Thompson, 241 Minn. 59, 62 N.W.2d 512. See, also, Minn. St. 610.21 and 631.01.

"not guilty" in the burglary prosecution, a finding that defendant established an alibi which bars his prosecution for indecent assault. We are of the opinion that the record is too sketchy and fragmentary to permit such a holding.

The record which has been presented consists only of a stipulation between the prosecuting attorney and the defendant's attorney, a portion of the court's charge in the burglary case, the certification of the important and doubtful questions, and the consent of the defendant to having the questions certified. The state has stipulated that the person who committed the burglary on May 25, 1959, was the same person who committed the assault on that date. Paragraph 11 of the stipulation further provides as follows:

> "* * * The Defendant was found not guilty of being the burglar who so broke and entered the Hartwell dwelling house."

Literally construed, this statement would seem to concede that the alibi defense prompted defendant's acquittal. However, such a conclusion does not jibe with the position the state has elsewhere taken in its brief and argument, and the statement appears to us to be sufficiently ambiguous to leave the question open.

The record does not support defendant's claim that his only defense was an alibi. Without a transcript we can only speculate on what the defendant's evidence was. Neither do we have before us the closing argument of defendant's counsel or the full charge to the jury in the burglary case. The trial court did instruct the jury that the defendant denied having taken part in the crime which was committed May 25, 1959, in the following language:

> "Now, it is the contention of the defendant that he had no part in any breaking and entering of the Hartwell home in the early morning of May 25, 1959, and shortly after midnight of May 24, 1959, and that if any crime was committed by anyone he had no part in it. The defendant further contends that he did not commit any assault on either Martha Hartwell or Lucella Hartwell, and that since he did not break and enter into the Hartwell home at that time or any other time, he could not have entered the Hartwell home with the intent to commit the crime of assault therein. The defendant fur-

> ther contends that while he was absent from his home for some time in the afternoon, he returned home at approximately midnight and stayed there, and therefore could not have committed the offense with which he has been charged."

However, it is significant that immediately following this part of the charge the court continued as follows:

> "* * * In general it is fair to say that the *defendant categorically denies the claims made by the State*, and further contends that the *State has not sustained its burden of proving his guilt beyond a reasonable doubt*." (Italics supplied.)

In other words, from the inadequate record before us it appears that defendant put the state to its proof with respect to all of the elements of the crime. He did not stipulate that a burglary had been committed and that the only issue for the jury was the question of his identity or implication in the offense. Had he done so, the acquittal in the burglary trial would obviously be res judicata in the assault prosecution and would bar further proceedings against this defendant arising out of the events of May 25, 1959.

The difficulty which courts have had with the concept of res judicata or collateral estoppel in criminal matters ordinarily has not stemmed from a reluctance to adopt the principle of the doctrine. The struggle has revolved around its application to particular fact situations, such as the dilemma facing the court in the case at bar. We are wholly in the dark as to whether the jury decided that defendant did break and enter the Hartwell home but did not then intend to commit an assault, or whether the jury determined that the state had failed to prove a felonious breaking and entering, or whether the jury did indeed find defendant had proved a valid alibi.

3. Although an attempt has been made by defendant to prove, through the affidavits of various jurors, that they found defendant was not actually present at the time the burglary was committed, such an invasion into the jury's deliberations is an intrusion which the law does not sanction and to which no weight can be given. In Fayerweather v. Ritch, 195 U.S. 276, 306, 25 S.Ct. 58, 67, 49 L.ed. 193, 213, the United States Supreme Court made the following observation:

"But it is proper to say that the secret deliberations of the jury, or grounds of their proceedings while engaged in making up their verdict, are not competent or admissible evidence of the issues or finding. The jurors oftentimes, though they may concur in the result, differ as to the grounds or reasons upon which they arrive at it.

"The evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration, and then the record furnishes the only proper proof of the verdict.

* * * * *

"* * * A judgment is a solemn record. Parties have a right to rely upon it. It should not lightly be disturbed, and ought never to be overthrown or limited by the oral testimony of a judge or juror of what he had in mind at the time of the decision. Undoubtedly, when the pleadings are general, as in a case of the common counts, evidence may be given of the testimony which was introduced on the trial, for that may disclose what must have been considered and determined. And where the evidence is that testimony was offered at the prior trial upon several distinct issues, the decision of any one of which would justify the verdict or judgment, then the conclusion must be that the prior decision is not an adjudication upon any particular issue or issues, and the plea of *res judicata* must fail."

4. While our attention has not been called to any Minnesota criminal case dealing with collateral estoppel, our Federal court has recognized the doctrine in United States v. J. R. Watkins Co. (D. Minn.) 127 F.Supp. 97, 101. Cases which have held that an alibi, asserted in one case, is res judicata with respect to a second prosecution arising out of the same events uniformly find that the only issue litigated in the first case was the alibi defense. People v. Grzeszczak, 77 Misc. 202, 137 N.Y.S. 538; Harris v. State, 193 Ga. 109, 17 S.E.2d 573, 147 A.L.R. 980. In the Grzeszczak case the court stated that the defendant did not deny the crime was in fact committed, but relied entirely on an alibi. By the same token, the court in the Harris case observed that in the first trial there was no pretense of justification, but the whole contention centered on

the single question of whether defendant participated in the offense. The court held that his acquittal in the first case necessarily required a finding that he did not participate in the transaction and that this was the sole issue tried and determined. A similar result was reached in United States v. DeAngelo, (3 Cir.) 138 F.2d 466.

The Supreme Court of the State of Washington came to grips with these matters in State v. Barton, 5 Wash.2d 234, 105 P.2d 63. There the defendant was tried and acquitted of murder and was subsequently charged with having committed a robbery on the same victim. In the second prosecution defendant claimed that his sole defense in the first trial was an alibi, and that his acquittal was a final adjudication of whether he participated in either crime. The court rejected this contention, pointing out that the plea of "not guilty" had placed every material allegation of the information in issue and required the state to prove them all beyond a reasonable doubt. The Washington court stated: (5 Wash.2d 241, 105 P.2d 67):

> "• • • It is not possible to determine whether the jurors returned a verdict of acquittal because they credited the testimony in support of appellant's alibi, or for the reason that they found the state's evidence insufficient as to one or more essential elements of the offense charged."

A number of other courts have reached the same conclusion.[2] The leading case on the subject arose out of a criminal trial in the state of New Jersey, State v. Hoag, 21 N.J. 496, 122 A.2d 628, affirmed, 356 U.S. 464, 78 S.Ct. 829, 2 L.ed.2d 913.[3] That prosecution involved a robbery committed against five victims. The defendant was first prosecuted for robbing three of the victims and interposed an alibi as a defense. He was acquitted. Subsequently, the state prosecuted the same defendant for robbing the fourth victim and defendant was convicted. In a 4-to-3 decision, the Supreme Court of New

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[2]State v. Orth, 106 Ohio App. 35, 153 N.E.2d 394, appeal dismissed, 167 Ohio 388, 148 N.E.2d 917. State v. Feinzilber, 76 Nev. 142, 350 P.2d 399, Adams v. United States (5 Cir.), 287 F.2d 399. See, People v. Rodgers, 184 App. Div. 461, 464 to 466, 171 N.Y.S. 451, 453 to 454.

[3]74 Harv. L. Rev. 35.

Jersey upheld the conviction and was sustained by a 5-to-3 decision of the United States Supreme Court. The New Jersey court held that the principles involved had to do with collateral estoppel rather than res judicata, each indictment being a separate cause of action. The majority simply held that there was no way of knowing on what ground defendant was acquitted in the first prosecution, whether because the jury believed his alibi or because of a general insufficiency in the state's proof. The prevailing opinion in the United States Supreme Court also treats the problem as one of collateral estoppel, which they describe as an aspect of the broader doctrine of res judicata, designed to eliminate the expense, vexation, waste, and possible inconsistent results of duplicatory litigation. The Supreme Court concluded that it would have to embark on sheer speculation in order to sustain the defendant's claim that the jury had determined the issue of identity in his favor. It held that the New Jersey Supreme Court did not exceed constitutional bounds in concluding that the jury might have acquitted defendant because it didn't believe that the victims of the first robbery had been put in fear, or that property had been taken from them, or for other reasons unrelated to the issue of identity. The dissent of Chief Justice Warren notes that the record fails to show what was in the mind of each juror, but suggests that even a special interrogatory might not settle the issue of the robber's identity. The Chief Justice states that he is satisfied from an examination of the record that the only *contested* issue was whether defendant was actually one of the robbers since the other elements of the crime were not challenged.

An exhaustive treatment of this subject, in a decision which sustained the defendant on the issue of collateral estoppel arising out of an alibi, may be found in People v. De Sisto, 27 Misc.2d 217, 236, 252, 211 N.Y.S.2d 858, 881, 897.[4]

We are of the opinion that where an alibi is advanced by the defendant in the first trial as only one of several defenses, his acquittal does not factually or logically require a finding

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[4]See, also, Annotation, 147 A.L.R. 1003; Gershenson, *Res Judicata in Successive Criminal Prosecution*, 24 Brooklyn L. Rev. 12; Kircheimer, *The Act, the Offense and Double Jeopardy*, 58 Yale L.J. 513, 532; Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 Iowa L. Rev. 317; Note, 24 Minn. L. R. v. 522, 538; Schmidt, *Res Adjudicata in Criminal Cases*, 26 Calif. B.J. 366; United States v. Kramer (2 Cir.) 289 F.2d 909.

that the jury determined the alibi question in his favor. If a more extensive record in this case, including the testimony of defendant and his witnesses, the closing argument of defendant's counsel, and the full charge of the court, satisfies the trial court that no other issue was raised or submitted by defendant, the trial court will dismiss the indictment for assault under the doctrine of collateral estoppel. For the reasons stated, the matter is remanded to afford defendant an opportunity to make such a showing, and in the event of his inability to do so, he will be tried under the indictment for assault.

5. There is no merit in the defendant's claim that, because he was not indicted or taken into custody until more than a year after the offense alleged, he has been denied a speedy trial. Ordinarily, the constitutional protection of a speedy trial envelopes defendant only from the time he is taken into custody and indicates to the court that he is prepared to go forward. State v. Arviz, 154 Minn. 290, 191 N.W. 605; State v. McTague, 173 Minn. 153, 216 N.W. 787; State v. Dehler, 257 Minn. 549, 556, 102 N.W. (2d) 696, 702; State ex rel McGregor v. Rigg, 260 Minn. 141, 109 N.W. (2d) 310; State v. Castle, 260 Minn. 293, 109 N.W. (2d) 593.[5] In the case at bar defendant was apprehended on June 14, 1960, indicted for assault on June 28, 1960, arraigned and entered a plea of not guilty on June 30, 1960, and moved to dismiss the indictment on July 12, 1960. The trial court allowed counsel 30 days in which to file briefs, during which period defendant made additional motions, all of them being heard by the court on September 12, 1960. On September 20, 1960, the court denied defendant's motion to dismiss the indictment but on motion of defendant's counsel certified to us as important and doubtful the two questions here for decision. The defendant, having been advised of the delay which would inevitably result from certifying the questions, consented in writing to this procedure. Bail originally fixed at $10,000 was reduced to $5,000 on October 10, 1960. At no point does the record show any request, formal or informal, on the part of defendant or his counsel, for immediate trial.

The primary purpose of the constitutional protection being

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[5]See, also, Minn. St. 611.04.

to obviate protracted custody without an adjudication, we hold that where a defendant has made no request to the court that his case be sent out, a lapse of 90 days under the circumstances here described is not a denial of his constitutional right to a speedy trial. The second question certified is therefore answered in the negative.

6. There is inserted in the briefs of both defendant and the state extraneous and irrelevant material, calculated on the one hand to stir our sympathy for defendant, and on the other to arouse hostility against him. Such excursions from the record are designed to distract us from reaching a decision based on the law and invite us to ignore logic and precedent. They are improper and should be stricken.

Remanded with directions.

MR. JUSTICE ROGOSHESKE, not having been a member of the court at the time of the argument and submission, took no part in the consideration or decision of this case.

KNUTSON, Chief Justice (concurring specially).

In order that there may be a majority of the court to answer the questions submitted to us by the trial court, I reluctantly concur in the result reached by Mr. Justice Otis.

I think that the first question submitted to us should be answered in the negative without any qualifications. What we are now doing is to remand the case with leave to defendant to do something that in my opinion is impossible. The only way that it could be known that the jury decided the case exclusively on the grounds of an alibi would be if the court submitted the case to the jury on the theory that unless they found an alibi they must find defendant guilty as charged. Were such an instruction given, it is obvious that we would promptly reverse.

In every criminal case it is necesary that the jury be unanimous in a decision for either a conviction or an acquittal. No one can now know on what basis any of the 12 members of the jury voted for an acquittal. It is necessary that the jury be instructed that the defendant is clothed with the presumption of innocence and that the state must prove every essential element of the crime beyond a reasonable doubt before there can be a conviction. For all that anyone knows, there may be 12 reasons why the 12 members of the jury vote for

an acquittal. As a matter of fact, they can vote for an acquittal even though they have no reason at all. It is obviously for that reason that Minn. St. 621.12 was enacted, which reads:

> "Every person who, having entered a building under such circumstances as to constitute burglary in any degree, shall commit any crime therein, shall be punished therefor as well as for the burglary, and may be prosecuted for each crime separately."

In State v. Hackett, 47 Minn. 425, 50 N.W. 472, the question involved here was answered as clearly as it can be answered. Hackett was indicted, charged with, and convicted of the crime of grand larceny in the second degree. He appealed from an order denying a new trial. He was also indicted, tried, and acquitted of the crime of burglary in the first degree. In this latter trial, testimony was introduced tending to show that at the same time and place of the alleged burglary defendant stole the property described in the grand larceny indictment. This testimony was produced for the purpose of proving an intent to commit and the commission of the crime of burglary. The court held that the larceny and the alleged burglary were committed and were parts of the same transaction. The court referred to our statute, Penal Code of 1886, §393, which stated that "[a] person who, having entered a building under such circumstances as to constitute burglary in any degree, commits any crime therein, is punishable therefor, as well as for the burglary; and may be prosecuted for each crime separately" and pointed out that (47 Minn. 427, 50 N.W. 473) "[a]lthough declared by statute, this is no new statement of the law applicable to the case at bar."

Here, the state was required to prove beyond a reasonable doubt that defendant (1) with the intent to commit some crime therein, (2) broke into, and (3) entered the dwelling house of another, in which (4) there was a human being, (5) *under circumstances not amounting to burglary in the first* degree, before defendant could be convicted. How it is now possible to show that the jury based its verdict entirely upon a finding that defendant was not at the place of the alleged burglary is something that it is impossible for me to comprehend.

It may be true that there are authorities to the contrary, but our statute and our case law permit the indictment and trial of a defendant for both the burglary and the crime alleged to have been committed as the foundation for the burglary charge, and I think we need go no further than our own opinions. If we must do so, I think that the case of Hoag v. New Jersey, 21 N.J. 496, 122 A.(2d) 628, affirmed, 356 U.S. 464, 78 S.Ct. 829, 2 L.ed.(2d) 913, contains a most convincing argument in favor of so holding.

The Washington court in State v. Barton, 5 Wash. (2d) 234, 105 P. (2d) 63, came to the same conclusion, and the quotation contained in the opinion of Mr. Justice Otis from that case is in my opinion unanswerable. How a defendant can now go back and show—either from the transcript, the court's charge, or the arguments of the attorneys—that the only issue submitted to the jury upon which it based its decision was an alibi is incredible to me. Even though the county attorney may have stipulated that defendant was acquitted on the issue of identity raised by his alibi, such stipulation, in my opinion, must be disregarded since no county attorney has any more right to speculate as to the reason for a jury's verdict than does the court or anyone else. It may be that the county attorney may try a criminal case on a stipulation of facts and the issues entered into between the parties after he has carefully investigated the facts, but that does not authorize him to stipulate on appeal what he thinks the jury may have based its decision on where several issues are involved, such as we have here. I therefore think that the question submitted should be answered in the negative without any qualification as is required by both statute and case law in this state.

Our former chief justice, Roger L. Dell, who took part in the hearing and consideration of this case, resigned before the opinion was issued. He was of the same opinion as I am as shown herein.

THOMAS GALLAGHER, Justice (dissenting).

The stipulated facts which form the basis for these proceedings indicate the following: On May 25, 1959, the Hartwell residence at 1533 Van Buren, St. Paul, in which Martha Hartwell and Lucella Hartwell, her daughter, were residents, was broken into by a man at about 12:30 a. m. At that time

the intruder grasped Lucella Hartwell by the arm and forced her to accompany him into the second-floor bedroom occupied by Martha Hartwell. There he grabbed a telephone from the hands of Lucella Hartwell, ripped the sheet into strips with which he tied Martha Hartwell, and thereafter inflicted numerous indignities upon both of the Hartwells. In the course of his presence there, Lucella struck this intruder with a cut-glass flower vase, causing him to bleed. As a result of a police inquiry, defendant was taken into custody for these offenses on June 5, 1959. On June 23, 1959, he was indicted and thereafter tried for burglary with the intent to commit assault. At his trial some 19 witnesses appeared and testified. He was acquitted on January 22, 1960.

On June 14, 1960, at 2:30 a. m., the St. Paul Police Department received a call concerning another break-in at the Hartwell residence. Responding police officers found there that a basement window and a doorway between the basement and first floor had been broken but that no intruder was then present. They then traveled one-half mile to defendant's residence at 919 North Snelling Avenue but found that defendant was absent. Leaving this house, the officers traveled back toward the Hartwell residence. En route they found defendant walking along Snelling Avenue about midpoint between the two residences. At that time, they examined him and found that his clothes were disheveled and dirty; and that in his pocket was a small notebook which disclosed a notation giving the residence address and telephone number of Lucella Hartwell. He was taken to a St. Paul police station and there booked on suspicion of burglary. His clothing and portions of the broken window found at 1533 Van Buren were then sent to the State Bureau of Criminal Apprehension for laboratory examination. He was arrested on suspicion that he was the person who was guilty of unlawful entry on this occasion.

On June 28, 1960, testimony of various witnesses was submitted to a grand jury of Ramsey County relative to the break-in of *May 25, 1959*, and the second break-in of June 14, 1960. This jury was advised that as to the first break-in defendant had been indicted and tried for burglary in the second degree with intent to assault, and had been found not

guilty therein. The grand jury thereupon returned an indictment in the following language:

> "The said Robert Hugh Robinson on the 25th day of May A.D. 1959, at the City of St. Paul in said County then and there being, did wilfully, unlawfully and feloniously take indecent liberties without her consent expressly given, with and on the person of one Lucella Hartwell; she, the said Lucella Hartwell, being then and there over the age of sixteen years and not a public prostitute, which said acts of him, the said Robert Hugh Robinson, did not in law amount to a rape, an attempt to commit a rape, or an assault with intent to commit a rape."

At the first trial in which defendant was acquitted, the instructions to the jury included the following:

> "It is the contention of the State that in the early morning of May 25, 1959, and shortly after midnight of May 24, 1959, the defendant broke and entered the dwelling house of Martha Hartwell, said dwelling house being located at 1533 Van Buren Avenue * * *; that at the time of such breaking and entering into said dwelling house there were then and there present in said dwelling house * * * Martha Hartwell and Lucella Hartwell; that the said breaking and entering * * * by * * * defendant was with the intention to commit the crime of assault in said dwelling house. * * * The State further contends that the defendant was in said dwelling house for approximately 45 minutes, and during this time *assaulted both Martha Hartwell and Lucella Hartwell by applying actual force to and inflicting immediate injury to the persons of Martha Hartwell and Lucella Hartwell.* * *
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> "* * * The defendant further contends that he did not commit any assault on either Martha Hartwell or Lucella Hartwell, and that since he did not break and enter into the Hartwell home at that time or any other time, he could not have entered the Hartwell home with the intent to commit the crime of assault therein." (Italics supplied.)

As indicated above, this jury returned a verdict of not guilty. On June 30, 1960, defendant was arraigned on an in-

dictment dated June 28, 1960, which related to the acts transpiring on May 25, 1959, and had no relationship to the unlawful entry of June 14, 1960. On June 30, 1960, he entered a plea of not guilty thereto.

On July 12, 1960, defendant moved for dismissal on the ground that to be tried thereon would place him in double jeopardy and later on the ground that it would constitute a denial of his right to a speedy trial. On September 12, 1960, the District Court of Ramsey County entered an order denying this motion. On September 20, 1960, pursuant to Minn. St. 632.10, it certified to this court for determination the following "doubtful and important" questions:

> "1. Under the circumstances disclosed by the record, upon which there is no dispute, does the indictment charging Indecent Assault, the object of the burglary charged in the previous indictment for which the defendant was tried and found not guilty by a jury, and a trial thereupon, constitute double jeopardy within the meaning of Article 5 of the Constitution of the State of Minnesota?
>
> "2. Does the lapse of time between the arrest in June, 1959 and the indictment for said Indecent Assault in 1960 deprive the defendant of his right to a speedy trial, as provided in Article 6 of the Constitution of Minnesota?"

1. The state relies upon Minn. St. 621.12 which provides: "Every person who, having entered a building under such circumstances as to constitute burglary in any degree, shall commit any crime therein, shall be punished therefor as well as for the burglary, and may be prosecuted for each crime separately"; and State v. Hackett, 47 Minn. 425, 50 N.W. 472, which held that under this section a person acquitted of the crime of burglary might nevertheless be prosecuted later for larceny committed in the course of the burglary involved. This was based on the theory that any evidence relative to larceny must have been received in the prior prosecution as part of the res gestae relative to the burglary, since there had been no charge of larceny and no prosecution therefor in such proceedings.

In the instant case, at the prior trial defendant was acquitted of the crime of burglary in the second degree with

the intent to assault, and it would seem clear that this determination constitutes a bar to his prosecution now under an indictment for indecent assault arising out of the identical factual situation. In the former proceedings the testimony received in evidence was relevant both to the crime of burglary and to the crime of assault. The same evidence of necessity would have to be submitted if defendant's guilt under the second indictment is to be established. In State v. Thompson, 241 Minn. 59, 64, 62 N.W. (2d) 512, 517, we stated:

> "* * * it may be said that two offenses are identical so that a prosecution for one is a bar to a prosecution for the second:
>
> "(1) If the evidentiary facts essential to establish the requisite elements of the offense charged in the second indictment would have been admissible under the first indictment—or information—to establish the elements of the offense charged therein and, *if proved*, would necessarily have resulted in a conviction under the first indictment. * * *."

Since it is clear that here the evidence required to convict defendant under the second indictment was submitted and received as relevant to his innocence or guilt under the first indictment, the jury's determination therein should constitute a bar to his prosecution under the second indictment.

At the first trial defendant's sole defense was that he was not the person described in the indictment charged with burglary in the second degree with the intent to commit assault. All evidence submitted by either side in this trial was received on the only theory of the defense—that the person who had assaulted the Hartwells on May 25, 1949, was the same person as the one who had broken into and entered their residence on that date, and that such person was not the defendant. The jury was definitely instructed that the person who had broken into the Hartwell residence was the same person who had then committed the assault upon the Hartwells. Under the indictment of June 28, 1960, the state now seeks to convict defendant by evidence of the identical factual situation under which the first jury determined that he was not the person who had unlawfully entered the Hartwell residence on May 25, 1959, and at that time committed the

assault with which defendant is charged in the new indictment.

Certainly, it would be grossly illogical to conclude that defendant's acquittal meant either that the first jury thereby determined that he was the burglar, but was not guilty of the charge because he did not intend an assault; or that he was not the burglar and because he was not that, he was not guilty under the indictment even though he intended the assault. The evidence in the prior prosecution compels the conclusion that the burglar there was the one who committed the assault. No one contended otherwise and the court so instructed the jury. Likewise, such evidence compels the conclusion that the person who committed the assault was not an invitee but a burglar. Under such circumstances, it is clear that the second prosecution is barred by the prior verdict. To hold otherwise brings about the absurd conclusion that although defendant is not the burglar who broke into and entered the Hartwell residence with intent to assault and who committed the assault on that occasion, nevertheless, he must again face trial on the charge that he is the burglar and did commit the assault described. I cannot adhere to any such medieval concept of due process or justice.

NELSON, Justice (dissenting).

I join in the dissent of Mr. Justice Thomas Gallagher.

APPENDIX F

Petition for Reargument

38265

STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,
Plaintiff-Respondent,

vs.

Robert Hugh Robinson,
Defendant-Appellant.

PETITION FOR REARGUMENT

Your petitioner, the defendant Robert Hugh Robinson, herewith petitions the Minnesota Supreme Court for rehearing and reconsideration of the opinion in the above entitled matter on the following grounds:

1. Neither the main opinion of Mr. Justice James C. Otis nor the special concurring opinion of Chief Justice Oscar R. Knutson appear to take full account of paragraph 10 of the stipulation between William B. Randall, County Attorney of Ramsey County, representing the State of Minnesota, and Joseph Robbie, Esq., representing the Defendant:

> "The assault alleged as the object of the Burglary in the first indictment returned June 23, 1959 (described in Paragraph 3 of this Stipulation) and the Indecent Assault alleged in the second Indictment returned June 28, 1960 (described in Paragraph 9 of this Stipulation) both arose from the incident which occurred May 25, 1959, at the Hartwell home (described in Paragraph 1 of this Stipulation) and the physical violence of the intruder on the person of Lucella Hartwell described

> therein furnishes the factual basis for the indecent assault alleged in the second indictment. Defendant was found not guilty of having committed the burglary charged in the first indictment by the verdict of the jury returned on January 22, 1960." (R. 9)

When this paragraph is read in context with the sentence occurring at paragraph 11 of the stipulation (R. 10) which was quoted by Mr. Justice Otis, "The Defendant was found not guilty of being the burglar who so broke and entered the Hartwell dwelling house," the stipulation is clear and unambiguous. It is manifest error to conclude otherwise than that the burglar and assailant were one and the same person and if Robinson was the burglar he was also the assailant and if he was not the burglar he was not the assailant. In the fact of this stipulation, it becomes manifest error to hold that any other issue than identity could have been litigated. If the Defendant had asserted any other defense than alibi, he could not have stipulated that the burglar and assailant were one and the same person without admitting his guilt of the indecent assault. The Defendant did not, and could not, assert any defense other than alibi. By claiming mistaken identification, alibi, and that he was not present on the burglarized premises, he could not place the state upon its proof or claim that if he was the burglar he did not intend to commit the assault and was therefore not guilty of the burglary indictment. The majority opinion holds that the defenses of Res Adjudicata and Collateral Estoppel are available to the defendant. This being true, the defendant is entitled to dismissal of the indictment based upon the Stipulation.

It is noted that Chief Justice Knutson, in his special concurring opinion, said, "Even though the county attorney may have stipulated that defendant was acquitted on the issue of identity raised by his alibi, such stipulation, in my opinion, must be disregarded since no county attorney has any more right to speculate as to the reason for a jury's verdict than does the court or anyone else." The Chief Justice significantly added, "It may be that the county attorney may try a criminal case on a stipulation of facts and the issues entered into between the parties after he has carefully investigated the facts, but that does not authorize him to stipulate on appeal what he thinks the jury may have based its decision on where several issues are involved, such as we have here."

The stipulation used by District Judge Robert V. Rensch as the basis for certifying the questions to the Supreme Court was entered into after careful investigation of the facts by the Ramsey County Attorney. *It does not constitute a stipulation as to the County Attorney's speculation as to the reason for the jury's verdict.* The Ramsey County Attorney personally tried the burglary indictment herein at issue. His stipulation is an agreement that the only issue litigated in the burglary trial was the issue of identity. He is not speculating about what the jury did. He is conceding that the jury had only one issue before it. He is agreeing in paragraph 10 of the stipulation that the assailant and burglar were one and the same person and that Robinson denied being the burglar or assailant and was acquitted.

Again, since the main opinion agrees that the present indictment should be dismissed if it is established that the defendant relied only on his alibi in the burglary trial, it is implicit in the stipulation that the County Attorney concedes that this is the only issue which was raised by the defendant. The only reason that the prosecutor and defense counsel stipulated the facts upon which the Supreme Court could consider the certified questions was that no dispute existed between them when such stipulation was entered as to what occurred at the burglary trial. Both were in agreement that the defendant relied upon the fact that he was not the intruder. Nothing is contained in this entire stipulation which speculates on anything which occurred within the jury room. All of it represents agreed facts as to what occurred at the burglary trial.

The first paragraph of the stipulation (R. 1) says, "It is hereby stipulated and agreed . . . that the following occurred." Hence, the lawyers stipulating the facts, not what they thought the jury decided. They were entitled to stipulate that at the first trial the only defense raised was identity, and in doing so they are not conjecturing as to what the jury decided. If they agreed that only one issue was submitted, they were then stipulating that that is the only issue which could have been settled by the jury. This is the nature of the stipulation. It is why the defendant did not submit anything further to the Supreme Court. This case is not here on appeal by the defendant from a verdict. It is here upon certification by the trial Judge that the questions involved are *important*

and *doubtful*. The stipulation represents the considered judgment of the trial Judge, the County Attorney, and the defense counsel, at the time the questions were certified, that no facts were in dispute including whether or not issues other than identity were litigated.

It would be impossible in this case for the defendant to have asserted any defense other than that he was not the *intruder* in the Hartwell home and was therefore not the *burglar* or *assailant*. The State admits that the burglar and assailant were the same person. So does the defendant and he would readily admit that if he were convicted of being the burglar this would inescapably mean that he was the assailant. Since he was acquitted, he could not be the assailant.

2. It is manifest error in the main opinion to say that "It appears that defendant put the state to its proof with respect to all of the elements of the crime." His plea of not guilty invokes that duty without further act on his part. He cannot prove an alibi without pleading not guilty. Hence, Res Adjudicata is meaningless in a criminal trial if this ruling is enforced that no particular issue is decided by the jury verdict because of the state's historic statutory obligation to prove all of the elements of the crime. The state's duty to prove all of the elements of the crime is imposed by statute, not by the defendant. When the state put in its case, the defendant had entered, introduced no evidence, and had required no proof. When the defendant put in his case and rested, the state rested without rebuttal or further evidence. Hence, the state put in no evidence of any kind whatsoever in response to any claim that the defendant put in on its proof with respect to any of the elements of the crime. It was incumbent upon the state by statute to prove every element of the crime without regard to what defenses were asserted by the accused.

Therefore, when the trial Judge said in his instructions, "The defendant categorically denies the claim as made by the state, and further contends that the state has not sustained its burden of proving his guilt beyond a reasonable doubt," he is merely saying that the defendant claims he is not the person who committed the alleged burglary and that the state has not sustained its burden of proving that he is beyond a reasonable doubt. There is nothing inconsistent about

this portion of the final instructions to the jury and the claim of the defendant that he was not the intruder and was never on the premises. In fact, the defendant could not deny that the burglary occurred or that Lucella Hartwell was assaulted because by his alibi, he could have no knowledge of what transpired on the Hartwell premises. He would have destroyed his alibi by asserting any other defenses.

Once the majority reached the opinion that Res Judicata and Collateral Estoppel are available to the defendant in a criminal case, the defendant was entitled to dismissal because he could assert no other defense than alibi. Other defenses would have been hopelessly inconsistent with the defendant's position that he was not present at the scene of the crime and did not intrude into or burglarize the Hartwell residence. It would be absurd to say that the defendant took the position that he was not at the Hartwell home but if he was he did not intend to assault Lucella Hartwell. No rational jury would have acquitted him under such circumstances.

3. The defendant respectfully asserts that *State vs. Hackett*, 47 Minn. 425, 50 N.W. 472, was distinguished in defendant's brief and in the oral argument of amicus curiae. In the *Hackett* decision, the defendant was charged with burglary and grand larceny at the same time and the charges were tried at the same term. The issues of Res Adjudicata and Collateral Estoppel apparently were never raised, discussed, argued or decided.

The defendant Robinson also raised the issue of constitutionality of Minn. Stat. 621.12 if interpreted to mean that a person acquitted of burglary may nevertheless be tried for a crime committed by the same burglar while in the building. By the majority opinion of Mr. Justice Otis, because of Res Adjudicata and Collateral Estoppel, one acquitted of burglary may not be subsequently tried for another crime committed by the burglar while in the building if the only issue litigated in the burglary trial was identity. This defendant asserts that Minn. Stat. 621.12 is a violation of due process of law under the State and Federal Constitutions if it is interpreted to give the state a second opportunity to try the same accused of a crime committed by a burglar when he has been acquitted of being that burglar. The constitutional issues are

not discussed in either the main opinion or the special concurring opinion.

4. It is manifest error to rule that the affidavits of jurors as to what they decided are an invasion into the jury's deliberations and an intrusion which the law does not sanction and to which no weight can be given. This is asserted in the main opinion. These affidavits do not collaterally attack the jury's verdict. They amplify the stipulation of respective counsel that the only issue litigated was identity. Contrary authority to the ruling of the majority is contained in the brief of Amicus Curiae (p. 8). Schmidt, "Res Judicata in Criminal Cases," 26 *California State Bar Journal* 366 (1951) is there quoted as saying, "When a matter is claimed to be Res Adjudicata as an Estoppel, it is often necessary and proper to look beyond the better judgment itself to determine what facts and issues were actually, or by necessary implication, adjudicated by the former judgment. The usual and appropriate manner of making this proof is to offer . . . the testimony of the judge and jurors who tried the case, . . ." Schmidt also indicates that parol evidence is admissible to identify the points or issues adjudicated in the former action.

5. The majority ruling that the constitutional protection of a speedy trial envelops the defendant only from the time he is taken into custody and indicates to the court that he is prepared to go forward because this does not consider the full factual situation in the instant case. The majority is correct in saying that the defendant was apprehended on June 14, 1960, indicted for assault on June 28, 1960, arraigned and entered a plea of not guilty on June 30, 1960, and moved to dismiss the indictment on July 12, 1960. What this overlooks is that the defendant was indicted for the crime of burglary arising from the same transaction on June 23, 1959. *The contention of the defendant is that if the Grand Jury and the Ramsey County Attorney intended to indict the defendant for the charge of indecent assault, it should have been done when he was in the Ramsey County Jail without charge from June 5 to June 10, 1959, and was thereafter indicted for burglary on June 23, 1959.* The lapse of one year between the indictment for burglary and the indictment for indecent assault arising from the same alleged criminal transaction is what the defendant finds particularly repugnant and this is not discussed in either the main opinion or the special con-

curring opinion. This lapse of one year is seriously prejudicial to the defendant. It clearly shows that the prosecutor, having failed to convict the defendant of being the burglar, waited nearly five months after the verdict, then submitted the facts to the Grand Jury again and obtained a second opportunity to attempt to convict the defendant for allegedly participating in the events where he had already been acquitted of being the intruder. This laches might not be objectionable had the defendant been a fugitive from justice or had the state returned the indictment immediately upon obtaining the information. Such is not the case here. The Grand Jury has the same information before it when it indicted the defendant for burglary in June, 1959, as it had before it on June 28, 1960, when it indicted the defendant for indecent assaut arising from the identical facts. This is what most clearly distinguishes the instant case from the *Hackett* decision. If the state can now prosecute the defendant for indecent assaut, there is nothing to prevent a later prosecution for larceny in the event that the defendant is found not guilty of indecent assault.

The defendant's claim of lack of a speedy trial, as discussed in his brief, is the lack of speedy indictment and prosecution to enable him to immediately answer to the charge. If the state can prosecute for burglary, at the time of acquittal, wait indefinitely into the future before commencing further charges arising from the same facts, it can conceivably wait long enough until the defendant no longer has available to him the evidence necessary to protect himself from conviction. This is the very vice that the constitutional guarantee of a speedy trial is intended to eliminate. Furthermore, if a defendant once acquitted of burglary is never secure from new indictments in the future for other crimes committed by the same burglar while on the burglarized premises, he is unable to hold a job or engage in other normal pursuits. This, again, is what the constitution intends to protect against by guaranteeing the right to a speedy trial.

Even under the *Hackett* decision it is only reasonable to construe Minn. Stat. 621.12 to mean that a burglar may be prosecuted for each crime separately which he commits while in the burglarized building provided that all charges are placed immediately. This statute is certainly not intended

to continue the opportunity of the prosecution indefinitely into the future to place a new charge every few month after every prior acquittal for a series of crimes committed by a burglar after he has broken and entered a building. This should be true even when the defendant is convicted of being the burglar.

According to the majority opinion in this case, a defendant could be convicted of burglary, sentenced to two years in prison, and tried again upon his release for another crime committed in the course of the same burglary. He might then serve another term upon conviction, and, upon again being released, be tried for another one of the same series of crimes. This could go on until the statute of limitations has intervened. This would be unfair to a convicted burglar.

What is it then to a defendant who has been acquitted of the burglary?

The majority opinion also overlooked the fact that the defendant served in the Ramsey County Jail for approximately seven months before he was acquitted of burglary. This was "protracted custody without an adjudication" as to the charge of indecent assault which was never placed during that seven months of incarceration.

6. The special concurring opinion says that the state was required to prove beyond a reasonable doubt that defendant (1) with the intent to commit some crime therein, (2) broke into, and (3) entered the dwelling house of another, in which (4) there was another human being, (5) under circumstances not amounting to burglary in the first degree before defendant could be convicted. As to this, defendant only asserted that he did not with intent to commit some crime therein, break into, and enter the dwelling place of another, in which there was a human being, under circumstances not amounting to burglary in the first degree, because he was not the intruder in the Hartwell home. Hence, his position as to all five necessary essentials to the crime of burglary on which he was tried was that since he was not the person who broke and entered, none of the essential elements could be proved.

7. The majority opinion mentions that the Court does not have before it the closing argument of defendant's counsel. I have now checked with the Court Reporter who was assigned to the burglary trial. He did not keep a stenographic report

or tape recording of defense counsel's final argument to the jury. This is seldom done in Ramsey County District Court because the state has no right of appeal from an acquittal and a new trial which results from a mistrial or jury deliberations which end in disagreement. No purpose is ordinarily served by recording the final argument of defense counsel.

The defendant does offer upon rehearing to furnish the Supreme Court with a complete stenographic transcript of defendant's case which will clearly show that defendant raised no issue by the evidence he placed in the record except that he was not at the place of the alleged burglary, did not participate, and therefore should be adjudged innocent on the sole issue of alibi or identity.

This was not done earlier only because Judge Rensch certified the questions based on the stipulation.

8. The defendant respectfully requests the Supreme Court to seriously consider this petition for rehearing on the basis that as to each issue raised his rights under state and federal constitutions are violated. He particularly alleges violation of due process of justice, protection against double jeopardy and the right to a speedy trial.

Respectfully submitted,

JOSEPH ROBBIE
827 Plymouth Building
Minneapolis 3, Minnesota
Attorney for Defendant

Dated this 12th day of March, 1962.

APPENDIX G

Order Denying the Petition for Reargument

(Petition Denied)

State of Minnesota
OFFICE OF CLERK OF SUPREME COURT
St. Paul, Minn.

April 11, 1962

State of Minnesota,
Plaintiff,

vs. 38265

Robert Hugh Robinson,
Defendant.

Sir:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

Yours respectfully,
MAE SHERMAN,
Clerk Supreme Court.